



# NEWSLINE

*An Official Publication of the Tennessee Auctioneer Commission  
Tennessee Department of Commerce and Insurance*



Volume XXXVII

March 2006

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## Chairperson's Report

by John McLemore, Chairperson



For those of you who keep a box score on who is and who is not a member of the Auctioneer Commission, there has been a lineup change. Kenneth Dreaden of Waverly, TN is now in the "at large" position. Terri Walker of Memphis has left the field after three years of excellent service.

We will miss Terri. She was never afraid to express her point of view and vote her conscience. I have not met Kenneth, but I'm told he is returning to the Commission after several seasons on the bench. When I called to congratulate him on his appointment, he told me he and Marvin Alexander served together the last time he was on the commission. They are back together again.

Just before or just after Christmas, Lynn McGill, our director, sent me an email with "Attorney General's Opinion" on the subject line. Was this the present we had been waiting for since the end of the summer? Were we finally going to know whether the Commission is responsible for regulating Internet drop off stores? When I opened it, alas, it was not. However, I'm assured by Lynn the Attorney General's office has called to let us know they are working on what everyone will ultimately call the "eBay" opinion.

This time the Attorney General handed down a very clear and concise opinion on when does an auction advertised as "ABSOLUTE" actually become absolute. The answer: at the conclusion of the announcements immediately preceding the sale. According to the opinion an auction can be advertised as an absolute auction for weeks preceding the sale, but the seller can change the terms of the sale at the last minute.

The opinion addresses the potential conflict between the auctioneer and the bidding public. It does not address the situation between the auctioneer and the seller who has signed a contract which binds the seller to an absolute auction or sale without reserve. It is my opinion every auction company will want to have the Attorney General's opinion in its firm file folder or loose leaf binder containing laws, rules and regulations. The Attorney General's Opinion No. 05-182 is displayed for your reading in this newsletter. I encourage you to read it and keep it available for future reference.

*(continued on page 4)*

## COMMISSION MEMBERS AND STAFF

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Term 9/1/04 - 8/31/07

**Howard Phillips,** Vice Chairman

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Term 8/31/04 - 8/31/07

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### MISSION STATEMENT:

The mission of the Tennessee Auctioneer Commission is to protect the public and licensees by monitoring the auctioneer profession through licensure and regulation.

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DEPARTMENT OF COMMERCE & INSURANCE

TENNESSEE AUCTIONEER COMMISSION

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ATTORNEY GENERAL  
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NASHVILLE, TENNESSEE 37202

December 22, 2005

Opinion No. 05-182

## Consequences of Advertising an “Absolute Auction”

### QUESTIONS

1. May an owner of real property that has been advertised for sale at “absolute auction” either withdraw the property from the sale or change the terms of the auction to add a reserve before the auctioneer has called for bids?
2. If an auction company, intending to conduct an absolute auction, has advertised an absolute auction but the owner modifies the terms prior to the sale to add a reserve and the modified terms are announced before bids are accepted:
  - (a) Would proceeding with the auction with reserves be a “substantial misrepresentation” in violation of Tenn. Code Ann. § 62-19-112(b)(1) or (b)(2) subjecting the auction company’s license to suspension or revocation?
  - (b) Would such actions or advertisements be a violation of Rule 0160-1-.20 (Advertising Guidelines) of the Tennessee Auctioneer Commission?
3. If an auction company, intending to conduct an absolute auction, advertises that a sale will be absolute and if the written advertisement contains a notice stating that “announcements made at the time for the auction will take precedence over all prior advertising statements,” would the advertisement be a misrepresentation under Tenn. Code Ann. § 62-19-112 or Rule 0160-1-.20 of the Tennessee Auctioneer Commission if an announcement was made, prior to taking bids, that the sale was being changed to one with reserves?
4. Would the conduct described in any of the above situations violate any other rule or statute?

### OPINIONS

1. Yes. Even though real property has previously been advertised for sale at absolute auction, the owner ordinarily may withdraw the property from sale or change the terms to add a reserve before the auctioneer calls for bids.
- 2(a). No.
- 2(b). No.
3. No.
4. No, such conduct would not violate any statute or rule of which this Office is aware.

### ANALYSIS

1. The first question is whether, when an auction has been advertised as “absolute,” the owner may withdraw the property from the sale or change the terms to add a reserve, so long as he or she does so before the auctioneer has called for bids. Under general authorities, as well as the

case law on the point in Tennessee, the answer is that an owner may do so. An “absolute auction” is defined by Auctioneer Commission Rule 0160-1-.19 as “[a]n auction at which property put up for sale is sold to the highest bidder, where the seller may not withdraw the property from the auction after the auctioneer calls for bids unless no bid is made in a reasonable time, where the seller may not bid himself or through an agent, and where the seller will deliver marketable title.” The rule also indicates that the term “absolute auction” is interchangeable with the term “auction without reserve.” “In an auction without reserve, after the auctioneer calls for bids on an article or lot, that article or lot cannot be withdrawn unless no bid is made within a reasonable time.” Tenn. Code Ann. § 47-2-328 (2001). While this provision of the Uniform Commercial Code applies only to the sale of goods, it does demonstrate the general principles that govern auctions of real estate as well.

This Office has previously opined “that an advertisement of an auction is not an offer to sell which becomes binding, even conditionally, on the owner when a bid is made, but is a mere declaration of intention to hold an auction at which bids will be accepted.” Op. Tenn. Att’y Gen. addressed to John C. Neff (July 10, 1981) (citing *Moore v. Berry*, 288 S.W.2d 465 (Tenn. Ct. App. 1955)). “[T]herefore, the advertisement of an ‘absolute auction’ would simply be a declaration of an intention and not binding on either the seller or the owner.” *Id.* The owner of the property may therefore withdraw his or her property from the sale before the auction begins, although the owner may then owe contractual damages to the auctioneer with whom the contract to sell was made. See generally *Alexander v. Hopkins*, 1998 WL 440743 (Tenn. Ct. App. 1998). Such damages would be determined by the specific terms of the contract involved and the specific facts.

“It is the right of the owner of the property sold at auction to prescribe . . . the manner, conditions, and terms of sale.” Op. Tenn. Att’y Gen. addressed to John C. Neff (July 10, 1981) (citing *Moore v. Berry*). A comment to the Uniform Commercial Code states that “[t]he prior announcement of the nature of the auction either as with reserve or without reserve will . . . enter as an ‘explicit term’ in the ‘putting up’ of the goods and conduct thereafter must be governed accordingly.” Tenn. Code Ann. § 47-2-328, Comment 2. This same comment indicates, however, that the U.C.C. “accepts the view that the goods may be withdrawn before they are actually ‘put up,’ regardless of whether the auction is advertised as one without reserve.” *Id.*

The U.C.C., while stating that the announcement of the terms of an auction is binding, does not explicitly address whether a later announcement shortly before the auction commences may modify the previously announced and advertised terms. The point is addressed, however, by the Restatement of Contracts, which states,

Unless a contrary intention is manifested, bids at an auction embody terms made known by advertisement, posting or other publication of which bidders are or should be aware, as modified by any announcements

made by the auctioneer when the goods are put up. RESTATEMENT 2d OF CONTRACTS §28(2) 1981). It is noted in 7 Am.Jur.2d Auctions & Auctioneers §16 (1980 & Supp. 1991), that these principles are derived from the common law, although there is some contrary authority. See 7 Am.Jur.2d Auctions & Auctioneers §18 (1997) (stating, "The courts differ as to the effect of a parol modification by the auctioneer, at the time of the sale, of terms previously announced in a written or printed notice of sale."). To the extent of the scant Tennessee authority, this State seems to follow the apparent majority rule. In *Moore v. Berry*, the auction in question had been widely advertised without mention of a reserve, but before calling for bids the auctioneer announced terms that did include the owner's right of reservation. 40 Tenn. App. 1, 5-6, 288 S.W.2d 465, 466-67. The court cited the general rule, as then stated in 5 Am.Jur. Auctions & Auctioneers §15, that terms and conditions announced "at the time and place appointed for the auction . . . generally are deemed to supersede all others and to bind the purchaser, even though he did not hear or understand the announcement or was not present at the time of the announcement . . ." *Moore v. Berry*, 40 Tenn. App. 9, 288 S.W.2d 468. From that, the court concluded, "It seems to be a settled rule in this state as well as elsewhere that conditions prescribed by the seller or owner and announced at the time and place of the auction are binding on the purchaser whether or not he knew or heard them." *Id.* Thus, the court held that the reservations as announced at the auction governed the terms of the sale.

In *Lawrence Paper Co. v. Rosen & Co.*, 939 F.2d 376 (6th Cir. 1991), the Sixth Circuit, while ruling in a case from Ohio, outlined the "legal understandings implicit in a sale by auction," quoting freely from *American Jurisprudence* 2d. Relying on the Restatement quoted above, the court found that "the weight of authority is that, even if some inconsistency existed between the advertised terms and the announcement made orally at the auction, the latter prevails." 939 F.2d 379. Moreover, this view seems consistent, not only with the positive law enacted by the U.C.C., but with the general notion that, even at an auction without reserve, the goods may be withdrawn from the sale at any time before the auctioneer calls for bids. The alternative would be a rule requiring owners and their auctioneers to withdraw property from an auction entirely, or go forward even though the terms announced earlier are no longer desirable. The effect of such a rule would be to require the owner to withdraw the land and conduct a new auction. Such a result would require landowners and auctioneers to incur additional expenses merely to leap through formalistic hoops to achieve the same result.

2(a). This conclusion essentially answers the remaining questions posed. If an auction company, consistent with the owner's stated intent, advertises a sale as an absolute auction, but then is directed before calling for bids to announce a reserve, under the law the auction becomes one with reserve. Obviously, the auction company has not made a "substantial misrepresentation" in violation of Tenn. Code Ann. § 62-19-12(b)(1) or (b)(2), since the advertisements were made in a manner consistent with the owner's

then-stated intent. If the auctioneer advertises the auction as without reserve, intends to administer it as such, and is unaware of the property owner's pending decision to alter that arrangement, then any representation that the auction is without reserve is not a misrepresentation of any material fact then known. Proceeding with the auction under different terms would not make the previous advertisement a misrepresentation. That the owner later had a change of mind does not mean that the auction company has made any misrepresentation at all, especially since it appears that the owner had a right to change the terms at the last minute.

2(b). Subsections (2)(a-d) of Rule 0160-1-.20 of the Tennessee Auctioneer Commission state that advertising shall be deemed to be false, deceptive, misleading, or untruthful if it:

(a) contains a misrepresentation of fact.

(b) is misleading or deceptive because in its content or in the context in which it is presented, it makes only a partial disclosure of relevant facts.

(c) creates a false or unjustified expectation of the services to be performed.

(d) contains any representation or claim that the advertising licensee in bad faith fails to perform. Such advertising is "expressly prohibited" by the Rule. For the reasons stated in Part 2(a) *supra*, there would be no violation of this rule under the stated facts. The expectations created by the advertisement may go partially unfulfilled, but if the auctioneer is proceeding from a good faith understanding with the seller, then the expectations at the time the advertisement is put forward are neither false nor unjustified. The auction company would only be acting in "bad faith" under subsection (d) if it learned of the changed circumstances and did not alter its advertising or other behavior with respect to the coming auction.

3. Under the law as stated above, it would obviously be appropriate for an auction company to include in its advertisements a statement that announcements made at the time of the auction take precedence over prior announcements. This provision would be in accordance with the legal rights of the owner of the property. Accordingly, such a course would not amount to a misrepresentation under any statute or rule.

4. This Office is not aware of any rule or statute which the described conduct would violate.

PAUL G. SUMMERS  
Attorney General  
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CHARLES L. LEWIS  
Deputy Attorney General  
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Assistant Attorney General

Requested by:  
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State Representative  
Suite 37, Legislative Plaza  
Nashville, Tennessee 37243-0160



*Chairman's Report (continued from page 1)*

While Tennessee Attorney General is completing his research and analysis to provide his interpretation of Tennessee Law as it applies to Internet drop off stores, two other state attorney generals have spoken. The North Dakota Public Service Commission which regulates auctioneers in that state has been told it has no duty to regulate Internet drop off stores. The Arkansas Auctioneer Licensing Board has been told by the Arkansas attorney general it is well within the scope of Arkansas law to regulate Internet drop off stores. I'm hoping the Tennessee Attorney General will have provided his opinion by the next time I write this column.

Meanwhile more Internet drop off stores are opening every week. The Tennessean had an article Jan. 25 about Frank Craven's Ease-e-Way store in Nashville. The story included the following: "Items he [Frank Craven] was trying to sell for a commission last week included a 2006 BMW M5....."

I wonder if our friends over at the Tennessee Motor Vehicle Commission have a subscription to the newspaper?

**Next TAC Seminars**

"Easements, Profits and Licenses in Land" will be our subject for the next two seminars. The dates and times are listed below. Remember, this is a free seminar to any and all auctioneers, apprentices, and staff. No pre-registration required.

***Programs at a glance...***

**Dates:** Monday, March 6, 2006  
Doubletree Murfreesboro  
1850 Old Fort Parkway, Murf., TN

Monday, May 1, 2006  
Doubletree Jackson  
1170 Highway 45 Bypass, Jackson, TN

**Time:** 8:00 a.m. Standard Time

**Topic:** "Easements, Profits & Licenses in Land"

**Credit:** 6 hours auctioneer credit

**Pre-registration:** None

Note: Real Estate CE credit has been applied for. To receive credit, you must show valid (1) auctioneer and (2) real estate license at registration.

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TENNESSEE DEPARTMENT OF COMMERCE AND INSURANCE AUTHORIZATION No. 335170, Revised 5/96. This public document was promulgated for 13,200 copies per issue, at a cost of 26 cents per copy, paid by the Tennessee Auctioneer Commission Education and Recovery Fund.

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